



Virginia  
Regulatory  
Town Hall

[townhall.state.va.us](http://townhall.state.va.us)

## Final Regulation Agency Background Document

<b>Approving authority name</b>	State Water Control Board
<b>Virginia Administrative Code (VAC) citation</b>	9 VAC 25-260
<b>Regulation title</b>	Water Quality Standards
<b>Action title</b>	Amendment to the State's Antidegradation Policy (9 VAC 25-260-30) by designating a segment of Bottom Creek in Montgomery and Roanoke Counties as an Exceptional State Water
<b>Document preparation date</b>	December 2, 2004

This information is required for executive review ([www.townhall.state.va.us/dpbpages/apaintro.htm#execreview](http://www.townhall.state.va.us/dpbpages/apaintro.htm#execreview)) and the Virginia Registrar of Regulations ([legis.state.va.us/codecomm/register/regindex.htm](http://legis.state.va.us/codecomm/register/regindex.htm)), pursuant to the Virginia Administrative Process Act ([www.townhall.state.va.us/dpbpages/dpb\\_apa.htm](http://www.townhall.state.va.us/dpbpages/dpb_apa.htm)), Executive Orders 21 (2002) and 58 (1999) ([www.governor.state.va.us/Press\\_Policy/Executive\\_Orders/EOHome.html](http://www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html)), and the *Virginia Register Form, Style, and Procedure Manual* ([http://legis.state.va.us/codecomm/register/download/styl8\\_95.rtf](http://legis.state.va.us/codecomm/register/download/styl8_95.rtf)).

### Brief summary

*Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also alert the reader to changes made to the regulation since publication of the proposed. Do **not** state each provision or amendment or restate the purpose and intent of the regulation.*

The proposed amendment to the Antidegradation Policy section (9 VAC 25-260-30) of the State's Water Quality Standards regulation designates a segment of Bottom Creek in Montgomery and Roanoke Counties for special protection as an Exceptional State Water (9 VAC 25-260-30.A.3.c). Since publication of the proposed amendment, the designation boundaries for the creek were revised – with the concurrence of the original petitioners - to include only those portions of the creek that did not receive riparian landowner objections.

## Statement of final agency action

*Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.*

---

The State Water Control Board adopted at their December 2, 2004 meeting an amendment to the Water Quality Standards regulation to designate as an Exceptional State Water a segment of Bottom Creek in Montgomery and Roanoke Counties.

## Legal basis

*Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

*If the final text differs from the text at the proposed stage, please indicate whether the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.*

---

§ 62.1-44.15(3a) of the Code of Virginia, as amended, mandates and authorizes the Board to establish water quality standards and policies for any State waters consistent with the purpose and general policy of the State Water Control Law, and to modify, amend or cancel any such standards or policies established. The federal Clean Water Act at 303(c) mandates the State Water Control Board to review and, as appropriate, modify and adopt water quality standards. The corresponding federal water quality standards regulation at 40 CFR 131.6 describes the minimum requirements for water quality standards. The minimum requirements are use designations, water quality criteria to protect the designated uses and an antidegradation policy. All of the citations mentioned describe mandates for water quality standards.

Web Address sites where citations can be found:

Federal Regulation web site  
<http://www.epa.gov/epahome/cfr40.htm>

Clean Water Act web site  
<http://www4.law.cornell.edu/uscode/33/1313.html>

State Water Control Law (Code of Virginia) web site  
<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.2>  
<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.15>

The Environmental Protection Agency (EPA) Water Quality Standards regulation (40 CFR 131.12) is the regulatory basis for the EPA requiring the states to establish within the antidegradation policy the Exceptional State Waters category and the eligibility decision criteria for these waters. EPA retains approval/disapproval oversight, but delegates to the states the election and designation of specific water bodies as Exceptional State Waters.

The Office of the Attorney General has certified that the agency has the statutory authority to promulgate final text of the regulation.

## Purpose

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.*

---

This proposed regulatory action is a necessary revision to the State water quality standards regulation. The State Water Control Board views Exceptional State Waters nominations as citizen petitions under § 9-6.14.71 of the Code of Virginia. Therefore, the Board took action on this petition for proposed designation because Department staff had concluded, based on the information available at the time of the preliminary evaluation, that the proposed designation met the eligibility requirements which a water body must meet before it can be afforded the extra point source protection provided by such a designation. The Exceptional State Waters category of the Antidegradation Policy allows the Board to designate waters which display exceptional environmental settings and either exceptional aquatic communities or exceptional recreational opportunities for added protection. Once designated, the Antidegradation Policy provides that no water quality degradation would be allowed in the Exceptional State Waters. The only exception would be temporary, limited impact activities. By ensuring that no water quality degradation is allowed to occur in waters with exceptional environmental settings and either exceptional recreational opportunities or exceptional aquatic communities, the Board is protecting these special waters at their present quality for use and enjoyment by future generations of Virginians.

## Substance

*Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.*

---

The amendment to the Antidegradation Policy (9 VAC 25-260-30), part of the State's Water Quality Standards regulation, designates a segment of Bottom Creek in Montgomery and Roanoke Counties for special protection as an Exceptional State Water (9 VAC 25-260-30.A.3.c).

## Issues

*Please identify the issues associated with the proposed regulatory action, including:*

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

*If there are no disadvantages to the public or the Commonwealth, please indicate.*

---

Upon permanent regulatory designation of a water body as an Exceptional State Water, the quality of that water body will be maintained and protected by not allowing any degradation except on a very short-term

basis. No new, additional or increased point source discharge of sewage, industrial wastes or other pollution would be allowed into waters designated. In addition, no new mixing zones would be allowed in the Exceptional State Water and mixing zones from upstream or tributary waters could not extend into the Exceptional State Water section.

A potential disadvantage to the public may be the prohibition of new or expanded permanent point source discharges imposed within the segment once the regulatory designation is effective that would cause riparian landowners within the designated segment to seek alternatives to discharging to the designated segment and, therefore, to have additional financial expenditures associated with wastewater or storm water treatment. The segment of Bottom Creek under consideration for designation does not currently contain any permitted point source discharges.

The primary advantage to the public is that this waterbody will be protected at its present high level of quality for the use and enjoyment of current and future generations of Virginians.

The factors to be considered in determining whether a nominated water body meets the eligibility decision criteria of exceptional environmental settings and possessing outstanding recreational opportunities and/or exceptional aquatic communities are described in the Department's revised April 25, 2001 "Guidance for Exceptional Surface Waters Designations in Antidegradation Policy Section of Virginia Water Quality Standards Regulation (9 VAC 25-260-30.A.3). The localities where the water body lies may experience financial benefits through an increase in eco-tourism to the area because of the exceptional nature of the water body that led to its designation.

There is no disadvantage to the agency or the Commonwealth that will result from the adoption of this amendment.

## Changes made since the proposed stage

*Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.*

**Section number:** 9 VAC 25-260-30

**Requirement at proposed stage:** (2) (~~Reserved~~) Bottom Creek in Montgomery and Roanoke County from its confluence with Big Laurel Creek downstream to its confluence with Goose Creek to form the South Fork of the Roanoke River.

**What has changed:** Description of the boundaries of the designation were modified: (2) (~~Reserved~~) Bottom Creek in Montgomery [County] and Roanoke County from [ its confluence with Big Laurel Creek Route 669 (Patterson Drive)] downstream to [its confluence with Goose Creek to form the South Fork of the Roanoke River the last property boundary of the Nature Conservancy on the southern side of the creek].

**Rationale for change:** In response to comment from riparian landowners who requested that the portion of Bottom Creek flowing past their properties not be included in the designation, the agency – with the concurrence of the original petitioners - revised the designation boundaries for the creek to include only those portions of the creek that did not receive landowner objections. The State Water Control Board adopted the modified designation boundaries at their December 2, 2004 meeting.

**Public comment**

*Please summarize all public comment received during the 60-day period following the publication of the proposed stage, and provide the agency response. If no public comment was received, please so indicate.*

<b>Commenter</b>	<b>Comment</b>
Paula Bittinger	Supports the nomination giving the scenic beauty and habitat necessary to support several species of rare fish as reasons for her support.
Stephen Bogese, II	Wrote in support of the nomination and stated that the eligibility criteria for Bottom Creek to be designated as Tier III has been clearly demonstrated. He urges the Board to support the designation for the benefit of current and future generations.
Gordon Dalton	Mr. Dalton said in his letter that he had made as many as 10 to 12 trips to Bottom Creek each year for the sole purpose of making a trip by boat down the class V rapids at the Bottom Creek Gorge and that the creek is the greatest of Virginia's "steep creeks" for whitewater kayakers. He said that the creek is known beyond the borders of Virginia as a world-class whitewater destination, with rapids and remoteness more akin to California or Colorado than the Old Dominion. He also commented on the scenery and the presence of a rare type of fern and three endangered fish species in the Gorge area.
Michael J. Gordon	Provided comment at the August 11, 2004 public hearing as well as by email. He stated his opposition to the proposed designation due to concerns of potential impacts to agriculture in the area, the possibility of an undisclosed agency agenda, and the concern that failed septic systems of properties along the proposed segment may not be able to be converted to single family treatment systems with a discharge. He feels his concern of failed septic systems without an acceptable alternative is a very real possibility and stated his capacity as a licensed excavating contractor who is familiar with the local geology and soil types as well as a resident of the area as qualifiers for the validity of that concern.
David Hunt, and	Supports the nomination stating their belief that the stream provides exceptional recreational and aesthetic resources for the locality and state and believe a Tier III designation for the stream will assist in preserving existing land uses which will allow it to continue to be a recreational asset to the state.
Ellen Aiken	Supports the nomination stating their belief that the stream provides exceptional recreational and aesthetic resources for the locality and state and believe a Tier III designation for the stream will assist in preserving existing land uses which will allow it to continue to be a recreational asset to the state.
Robert and Roberta Johnson	Spoke at the August 11, 2004 public hearing and affirmed his support of the proposed designation. He stated that over 50% of the streams in Virginia and the 2004 Water Quality Assessment report seems to indicate the situation is growing worse. Mr. Johnson stated that when a waterbody of exceptional quality is identified, common sense would dictate that it be protected by Tier III designation to avoid the long expensive TMDL development process and to preserve that waterbody for future generations. He also requested that comments dated June 23, 2003 and November 4 and 14, 2003 are re-submitted during this comment period. Mrs. Johnson stated her appreciation that the proposed designation has made it this far through the regulatory process and has utilized Bottom Creek for educational purposes in her capacity as a

	teacher a number of times.
Eldon L. Karr	Wrote in support of the nomination and stated that the section proposed for Tier III designation meets all three criteria necessary for designation. It is their hope that all of Bottom Creek from its headwaters through Bottom Creek Gorge will eventually be designated as Tier III.
Sue M. Karr	Wrote in support of the nomination and stated that the section proposed for Tier III designation meets all three criteria necessary for designation. It is their hope that all of Bottom Creek from its headwaters through Bottom Creek Gorge will eventually be designated as Tier III.
David Kovacs, Exec. Director, VA Conservation Network	Wrote on behalf of the over 100 member Virginia Conservation Network in support of the nomination and stated that Bottom Creek's pristine qualities, exceptional scenic and unique geological features make it deserving of a Tier III designation.
Andrea Krochalis, Bent Mountain Civic League	Spoke at the August 11, 2004 public hearing on behalf of one of the nominating parties, the Bent Mountain Civic League in support of the proposed designation. She stated they remain concerned about protection of endemic endangered fish species, the quality of the watershed, and the area's recreational aspects. They believe that this rulemaking is essential to the protection of the health safety and welfare of the citizens of the Commonwealth.
Clinton Morse	Spoke at the August 11, 2004 public hearing and asked that the portion of the proposed stream segment flowing through his property not be designated Tier III. He stated that they, as landowners along the proposed segment, have made considerable improvements to the stream through bank stabilization and reforestation efforts with the advice and assistance from the Department of Forestry. He stated his belief that he, as a landowner, have and will continue to accomplish more for the quality of the waterbody than a Tier III designation.
Ellen B. Rummel	Wrote in support of the nomination. As landowners in close proximity to the nominated segment of Bottom Creek they wish to protect its unique and pristine qualities and a Tier III designation seems an appropriate mechanism towards that goal.
Robert W. Rummel	Wrote in support of the nomination. As landowners in close proximity to the nominated segment of Bottom Creek they wish to protect its unique and pristine qualities and a Tier III designation seems an appropriate mechanism towards that goal.
James D. Scott	Wrote in support of the nomination and stated that all evidence submitted to the State Water Control Board supports the inclusion of Bottom Creek as Exceptional State Waters.
Katherine E. Slaughter, Senior Attorney, SELC	Wrote on behalf of the Southern Environmental Law Center in support of all proposed designations. She stated that all meet the eligibility criteria and all are located in areas used by either boaters, hunters, anglers, and wildlife observers and therefore are important to tourism, one of Virginia's most important industries.
Jeff Smith	Wrote to strongly support all proposed designations.
Bill Tanger, FORVA	Mr. Tanger, representing co-petitioners Friends of the Rivers of Virginia, Trout Unlimited, and Friends of the New River, provided oral comment at the August 11, 2004 public hearing in support of the proposed designation of Bottom Creek as well

Betty Byrne Ware	as support for all other waters currently proposed for Tier III designation.  Strongly supports all proposed designations and hopes more designations will be added in the future.
Jim Woltz	Opposes the designation stating his belief in property owners' rights and that Tier III designation should be elective for private property owners. He also believes land ownership within the Bottom Creek watershed has been ecologically responsible.
Eric E. Zicht	He states his concern that Virginia may be relinquishing some state powers when placing water bodies in this category and given the permanent nature of the designation, cautions the members of the Water Control Board to be very careful when designating any water body as "Exceptional".

**Agency response**

- **Issue:** Concerns of failed septic systems without the alternative of single-family treatment systems available.

**Response:** The commenter is correct. New and existing septic tank systems are allowed in Exceptional State Waters, but landowners would not be allowed to convert their septic tanks systems to a point source discharge such as a single family home package treatment plant because of the regulatory prohibition on point source discharges to the designated area.

- **Issue:** Does DEQ have an undisclosed agency agenda in regards to Tier III designations?

**Response:** No, there is no hidden agenda. These waters are protected after the effective date of their designation by a prohibition on new or increased point source discharges directly to the designated segment of the water body.

- **Issue:** May the portion of the proposed waterbody that flows through a riparian landowner's property be exempted from Tier III designation at the landowner's request?

**Response:** The Board may reduce - but not expand - the boundaries of a proposed designation without seeking additional public comment. Since comments were received from some of the landowners in opposition to the proposed boundary designation and the petitioners are agreeable to modifying the boundaries of the designation to include only those portions of the creek that did not receive landowner objections, the agency modified the designation boundaries to only include that part of the river where there were no comments made in opposition to the designation. The State Water Control Board adopted the modified designation boundaries at their December 2, 2004 meeting.

**All changes made in this regulatory action**

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.*

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
9 VAC 25-260-30	N/A	North Creek in Botetourt County from the first bridge above the United States Forest Service North Creek Camping Area to its headwaters is designated under 9 VAC 25-260-30.A.3.c as an Exceptional State Water.	The addition of a segment of Bottom Creek to 9 VAC 25-260-30.A.3.c. This water body meets all criteria necessary to be designated as Exceptional State Waters. The proposed designation boundaries were changed to include only those portions of the creek that did not receive landowner objections.

In 9 VAC 25-260-30 the following amendment was adopted by the State Water Control Board:

(2) ~~(Reserved.)~~ Bottom Creek in Montgomery [County] and Roanoke County from [ its confluence with Big Laurel Creek Route 669 (Patterson Drive)] downstream to [its confluence with Goose Creek to form the South Fork of the Roanoke River the last property boundary of the Nature Conservancy on the southern side of the creek].

**Impact on family**

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.*

The development of water quality standards is for the protection of public health and safety, which has only an indirect impact on families.